IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-45

GEORGE HANTSCHO CO., INC.,
Petitioner,

versus

BRIAN ATWOOD WANSOR, et al.,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION OF GEORGE HANTSCHO CO., INC.

JAMES R. HARPER
HARPER, SKIDMORE & BOTTS
400 Candler Building
Atlanta, Georgia 30303
(404) 524-4100

CULLEN M. WARD
JOHNSON, WARD, STANFIELD, LANHAM & CARR
1750 Equitable Building
Atlanta, Georgia 30303
(404) 524-5626

Attorneys for Respondents

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

CITATIONS

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-45

GEORGE HANTSCHO CO., INC.,
Petitioner,

versus

BRIAN ATWOOD WANSOR, et al.,
Respondents.

MEMORANDUM IN OPPOSITION TO PETITION OF GEORGE HANTSCHO CO., INC.

COUNTER STATEMENT OF THE CASE

Wansor was an employee of the owner of a printing press and had been working as a jogboy or journeyman for only three weeks when he lost his hands while helping to clean the presses.

At the conclusion of the Plaintiff's case charging negligence and a breach of implied warranty, the U. S. District Court for the Northern District of Georgia, William C. O'Kelley, Jr., granted Manufacturer's Motion for Directed Verdict.

The injured employee promptly filed motions for new trial, for reconsideration, and later filed a motion for transcript *forma pauperis* all of which were denied. After the normal time for notice of appeal had expired the trial judge extended the time, and this extension was based on a finding of excusable neglect.

The Court of Appeals in reviewing the Motion to Dismiss the injured employee's appeal determined that the District Court had not abused its discretion in extending the time for filing a notice of appeal because the delay was caused by "excusable neglect" as that term is used in Section 4(a) of the Federal Rules of Appellate Procedure.

Certain questions in regard to the substantive issues have been certified by the Court of Appeals to the Supreme Court of Georgia. Only the procedural question was raised in the Petition for a Writ of Certiorari.

When the directed verdict was entered against the Plaintiff, the parties and the court were under the impression that strict liability was not applicable in product cases under the Georgia statute. On the day of the verdict (March 20, 1975) the Georgia Court of Appeals reversed an earlier ruling and held that Georgia law, Georgia Code Section 105-106 "does impose a degree of strict liability upon manufacturers." *Parzini v. Center Chemical Company*, 134 Ga. App. 414; 214 S.E. 2d 700, 702. Wansor argues this mistaken impression of the Georgia law by the trial court and the mistake of his counsel in believing that the pendency of a motion for reconsideration would stay the running of time for a notice of appeal provide ample support for the trial court's finding of excusable neglect.

The trial court found excusable neglect by recognizing, ". . . a bonafide misunderstanding or mistake as to the law by counsel will constitute excusable neglect . . ."

The court should hold that the trial judge's finding of excusable neglect is to be given great deference in view of the hardship to this handless jogboy if validity of this appeal is denied. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). Whether "excusable neglect" within the formal rule allowing the District Court to extend time for filing notice of appeal depends upon the facts of each case, and this Petition

for Certiorari should be denied. *Buckley v. United States*, 382 F. 2d 611 (CA10-1967). The question as to excusable neglect has been determined by Judge O'Kelley on the basis of common sense meaning in the light of all the facts. Possibly more important than any other factor in the mind of the Judge was the change in law of product liability at the time of the directed verdict. The rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances. Injustice could only follow the failure to allow Brian Wansor his day in court.

COUNTER STATEMENT OF QUESTION PRESENTED

Did the trial judge abuse his discretion in finding that the period for filing a Notice of Appeal could be extended beyond the normal 60 day period on the basis of "excusable neglect" as that term is used in Rule 4(a) of the Federal Rules of Civil Procedure?

The trial judge predicated his finding of excusable neglect on the basis of the changing posture of the Georgia law of products liability at the time of the directed verdict and immediately thereafter, upon the economic hardship of Plaintiff, and other matters of record.

ARGUMENT

The Appellant in this proceeding argues as a basis for its petition that there is a diversity of the circuits. The many appellate court cases considering a trial court finding of excusable neglect do not suggest that any inflexible standard should be established. A review of the many cases considering the various factual bases for excusable neglect shows that the courts have treated the question on a case by case basis.

HISTORICAL PROSPECTIVE OF THE CASES

The Supreme Court in *Harris Truck Lines, Inc., supra,* used the phrase "unique circumstances". This was a 1962 opinion. Now here in 1978 in their petition the manufacturers say this is the "standard" for all courts to follow. The Respondent agrees that this case is still the judicial guide, but the guidelines from the court are not rigid. From manufacturer's (the Petitioner's) view of the case this is a strict standard in Harris Truck Lines, Inc. and a hard line that a trial judge must follow. This conclusion is hardly valid in view of the facts. Trial counsel for the truck line merely explained that the general counsel of the trucking company who was responsible for the litigation could not be contacted because he was traveling in Mexico. "Vactioning in Mexico" is hardly a factual basis from which to conclude that the Supreme Court was setting the judicial premise for a hard line of cases to follow. The Court there was considering Rule 73(a) of the Federal Rules of Civil Procedure. This rule set out only one instance of "excusable neglect", i.e. ". . . excusable neglect based on failure of a party to learn of the entry of judgment." Rule 73(a) FRCP was the antecedent of Rule 4(a) of the Federal Rules of Appellate Procedure, and it was Rule 4(a) considered by Judge O'Kelley of the United States District Court. The limiting

clause "based upon a failure of a party to learn of the entry of the judgment" was specifically deleted from Rule 73(a) in 1966 and no limiting language was included in Rule 4(a).

In discussing the purpose of Rule 73(a) as amended, the predecessor of Rule 4(a), the Advisory Committee commented as follows:

> "This purpose has been highlighted and the discretion of the District Court expanded by the recent amendment of Rule 73(a) to 'permit a finding of excusable neglect on any ground, not as heretofore, only if non-compliance stemmed from failure of entry of judgment'. H.R. Doc. 391, 89th Cong. 2nd Sess. (Feb. 28, 1966).

A 1966 opinion of the Fourth Circuit, *Evans v. Jones,* 366 F.2d 771 places the Advisory Committee comments in context.

In *C-Thru Products, Inc. v. Uniflex, Inc.* (CA2-1968) 397 F 2d 952, the Second Circuit interpreted the same provisions now found in Rule 4(a) rejected the argument that the extension can be granted only within the thirty day period:

> "Appellee contends that Rule 73, setting the time for appeal at 30 days and permitting extension of time for not more than an additional 30 days on a showing of excusable neglect, must be strictly construed to require that the showing must be made and order entered within the 60-day period following entry of the judgment from which appeal is taken. Such an interpretation would be unduly harsh and contrary to the spirit and purpose of Rule 73 as in effect in 1967. The time limitation is intended to set a period on which the parties may rely for required action by a litigant, not to dragoon a busy trial court into hasty and ill-considered action by the risk of destruction of appellate rights if the court does not meet the fixed deadline."

ANALYSIS OF RECENT CASES

The broad latitude vested in the trial court to find excusable neglect by the *Harris* case, which brought about the rule change embodied in Rule 4(a), has finally been reached by the circuit courts in the last six years. Appellate courts have recognized economic hardship, good faith, mistake as to appeal time, absence of notice to lead counsel, change or clarification in substantive law and similar reasons as "excusable neglect".

The Petitioners in this proceeding argues by reference to a number of cases that the Fifth Circuit has a divergent view of the term "excusable neglect" as found in Rule 4(a) of the Federal Rules of Appellate Procedure and cites many cases from other circuits in support of his petition. Diversity of the circuits argues the Petitioner. No diversity says the Respondent. As a basis for consideration of the question in the following paragraphs the Respondent cites many cases where the circuits have applied a more relaxed standard than the Petitioner here would urge the Supreme Court to announce. From an analysis of the cases following, the Respondent urges this court to find that the many cases wherein a trial judge has allowed late filing of a notice of appeal must be considered as a clear indication that the trial judge should be sustained where injustice would otherwise result.

The Petitioners here before the court have argued extensively that Counsel for the Plaintiff should have known that a motion for reconsideration would not extend the time for filing a notice of appeal. The Eighth Circuit has decided to the contrary. *Seshachalam v. Creighton University School of Medicine*, 545 F. 2d 1147 (CA8—1976). In this case the Court held that where an appellant filed a motion entitled Motion For Reconsideration, and where the motion drew in question the correctness of the judgment, it was functionally a motion under Fed. R. Civ. P. 59(e). The Court determined the 30 day period

for filing notice of appeal did not begin until a Motion For Reconsideration was denied.

Using *Seshachalam, supra,* as a guide, it would follow that where a Motion For Reconsideration draws into question the correctness of the entire judgment, it should stay the time for filing a Notice of Appeal. The main basis for the request for reconsideration by Brian Wansor was the change in the Georgia law of products liability. (See the Motion For Reconsideration as set out as Appendix A to this Memorandum). The Court was unaware of the change or clarification in the law, when he directed a verdict for the Defendant, Hantscho Manufacturing Company, Inc. The Fifth Circuit Court of Appeals has directed that some issues be certified to the Supreme Court of Georgia. It would indeed be unjust that Brian Wansor be thrown out of court on technical grounds when all of the parties and the District Court are now aware that the law was actively being reviewed and was changing to the benefit of all plaintiffs in product liability cases on the day that a directed verdict was entered against Wansor, this handless journeyman. See the order of Judge O'Kelley filed in the Clerk's Office September 25, 1975, which is reproduced as Appendix B to this Memorandum. Judge O'Kelley writes only of the change in law after the directed verdict was entered.

The Eighth Circuit considered the broad discretionary power to extend the time for filing a notice of appeal. *United States v. Wade,* 467 F. 2d 1226 (CA 8, 1972). In this case the trial court extended the time for filing a notice of appeal out of time even though it did not even make a specific finding of "excusable neglect". The Court of Appeals stated that they would infer that the trial judge made such a finding .

The Ninth Circuit has twice recognized the jurisdiction of a trial court to approve the late filing of a Notice of Appeal even though the motion to permit the filing was not filed until after

the expiration of the sixty day period mentioned in Rule 4(a) FRAP. *Nunc pro tunc* orders were approved in *Karstetter v. Caldwell*, 526 F. 2d 1144 (9th Cir. 1976), and *Salazar v. San Francisco BART*, 538 F. 2d 269 (9th Cir. 1976). In the *Salazar* case the court has even recognized "economic hardship" as "excusable neglect". If "economic hardship" can be treated as "excusable neglect", how can the petitioners in this case argue that the words "unique circumstances" extracted from some of the cases provided some special judicial restriction upon the determination of "excusable neglect"? Economic hardship is hardly "unique", even if it is specially restrictive language upon the trial judge's discretion. In any event Brian Wansor certainly has shown "economic hardship" (i.e. unique circumstances?)

Much of the brief in support of the Petition in this proceeding has been directed to argument that a misunderstanding of the law cannot be equated to excusable neglect. The Seventh Circuit felt that the real question for the trial court was good faith of counsel. In *Feeder Line Towing Service, Inc. v. Toledo, Peoria & Western Railroad Company*, 539 F. 2d 1107 (CA7-1976) the lawyer failed to understand the effect of an order dismissing a case without prejudice. "Counsel's delay was occasioned by conflicting language of two provisions of the law". There the court noted that the resolution of the "apparent conflict" was a question that a lawyer could be expected to resolve, but the court concluded, ". . . we cannot say that the district court abused its discretion in finding counsel's good faith." The Supreme Court will certainly infer, as did the Fifth Circuit, in Brian Wansor's appeal that Judge O'Kelley was convinced that the attorney for Brian Wansor was acting in good faith.

In *Dugan, d/b/a M. R. Dugan Auction Company v. Missouri Neon and Plastic Advertising Company, et al.*, 472 F. 2d 944 (CA8-1972) the court filed a notice of appeal out of time. The

District Court took into account that a similar case favorable to the appellant was published just before the expiration of the normal time for filing a notice of appeal. This clarification of the law was the basis for the opinion of the District Court that there was "excusable neglect". The Appellate Court found no abuse of discretion in the trial court and approved an extension of time for filing a notice of appeal even though the motion for extension was filed more than 60 days after the District Court entered its judgment. It has already been noted in this memorandum that the Georgia law applicable to the suit of Brian Wansor was clarified or changed after the judgment was entered against him.

Many sound reasons have been cited and discussed in this brief for upholding the trial court in its determination of excusable neglect in this proceeding, but none should be given greater weight than the Supreme Court reason expressed in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra.* There the Court said:

> "In view of the obvious great hardship to a party who relies upon the trial judge's finding of excusable neglect . . . and then suffers reversal of the finding, it should be given great deference by the reviewing court."

CONCLUSION

The Supreme Court opinion in 1962, *Harris Truck Lines, Inc., supra*, is still the law. There is no diversity of circuits as argued by the Petitioner, Hantscho Manufacturing Co., Inc. Each case should be decided on a case by case basis, and the Trial Court should be sustained where justice is served. The determination by the Fifth Circuit that the appeal of Brian Wansor should not be dismissed should be sustained. The ends

of justice would be served only if Brian Wansor is given his day in court.

Respectfully submitted,

JAMES R. HARPER
Attorney for Respondents

Of Counsel:

HARPER, SKIDMORE & BOTTS
Suite 400, The Candler Building
127 Peachtree Street, N. E.
Atlanta, Georgia 30303
(404) 524-4100

CULLEN M. WARD
JOHNSON, WARD, STANFIELD,
LANHAM & CARR
1750 Equitable Building
Atlanta, Georgia 30303
(404) 524-5626

APPENDIX

APPENDIX A

In the United States District Court
For the Northern District of Georgia
Atlanta Division

Brian Atwood Wansor vs. George Hantscho Company, Inc., a New York Corporation, vs. W. R. Bean & Son, Inc.	Civil Action No. 18601

Motion for Reconsideration

(Filed June 13, 1975)

Comes now BRIAN ATWOOD WANSOR, plaintiff in the captioned case, and respectfully moves the court to reconsider its Order entered June 4, 1975, denying plaintiff's motions for a new trial, judgment notwithstanding the verdict, and to set aside the judgment. The ground of said motion is that the court had erroneously construed and misapplied the cases of *Stovall & Co., Inc. v. Tate*, 124 Ga. App. 605 (1971), and *Poppell v. Waters*, 126 Ga. App. 385 (1972).

WHEREFORE, BRIAN ATWOOD WANSOR prays that the court consider this motion, vacate that part of its Order of

June 4, 1975 which denies his motions for a new trial, judgment notwithstanding the verdict and to set aside the judgment.

This 13th day of June, 1975.

/s/ CULLEN M. WARD
/s/ JACKSON C. FLOYD, JR.
1526 Fulton National Bank Building
Atlanta, Georgia 30303
Telephone: (404) 524-5626

Certificate of Service

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This 13 day of June, 1975.

/s/ C.M.W.

APPENDIX B

In the United States District Court for the
Northern District of Georgia
Atlanta Division

Brian Atwood Wansor

vs.

George Hantscho Company, Inc., a New York Corporation

vs.

W. R. Bean & Son, Inc.

Civil Action No. 18601

Order

(Filed September 25, 1975)

On the trial of the captioned case the court directed a verdict in favor of the defendant. Subsequently, the plaintiff filed a motion for a new trial and motion to set aside the judgment. In that motion the Plaintiff relied upon *Ellis v. Rich's, Inc.*, 233 Ga. 573 (1975), and *Parzini v. Center Chemical Co.*, 134 Ga. App. 414 (1975), as establishing the principle of strict liability in products liability cases in Georgia. After careful consideration, the court denied that motion, finding that the doctrine of strict liability applies only to a product with latent defects, relying upon *Poppell v. Waters*, 126 Ga. App. 385 (1972).

While the court at that time did not discuss the issue, the equipment in the case *sub judice* was manufactured and sold

prior to the enactment of Ga. Code Ann. § 105-106, which is the statute relied upon by the Georgia appellate courts imposing liability upon manufacturers for strict liability.

After that order the plaintiff again filed a motion for reconsideration, which was denied by the court. The last order denying the motion for reconsideration was entered on July 22, 1975. On September 22, 1975, the plaintiff filed another motion to reconsider and to set aside the judgment under rule 60(b).

A motion to reconsider must be filed within ten days. Fed. R. Civ. P. 59(e). Apparently, the plaintiff in this case is relying upon the provisions of section 6 of rule 60(b), Federal Rules of Civil Procedure, to justify filing this motion two months after the entry of the previous order denying reconsideration.

While the court does not consider the motion as timely filed, it has reviewed the motion and the recently decided case of the Supreme Court, *Center Chemical Co. v. Parzini*, Civ. No. 30082 (Ga. Supreme Ct., Sept. 2, 1975). The court does not find anything in this Supreme Court decision that would warrant setting aside its previous judgment. In fact, the Georgia Supreme Court, in section 5 of that opinion, quoting from *American Jurisprudence*, stated: "'. . . [I]f the user or consumer discovers the defect and is aware of the danger, but nevertheless proceeds unreasonably to make use of the product, he is barred from recovery.' 63 AmJur2d, p. 155, § 150."

Plaintiff's motion to reconsider the court's prior ruling and its motion to set aside judgment under rule 60(b) is hereby DENIED.

IT IS SO ORDERED this 24th day of September, 1975.

/s/ WILLIAM C. O'KELLEY
United States District Judge